Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

Consumer Electronics Industry Opposition To Petitions For Reconsideration

Michael D. Petricone
Vice President, Technology Policy
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201
(703) 907-7600

Marc A. Pearl
Executive Director
Consumer Electronics Retailers Coalition
1341 G Street, N.W. – Suite 1100
Washington, D.C. 20005
(202) 585-0268

Of counsel:

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8081

March 10, 2004

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

Consumer Electronics Industry
Opposition To Petitions For Reconsideration

The Consumer Electronics Association ("CEA") and the Consumer Electronics Retailers Coalition ("CERC") respectfully submit this opposition to the six petitions for reconsideration of the Second Report and Order[1] in the above-captioned proceeding. In Comments and Reply Comments filed jointly on March 28,[2] and April 28,[3] 2003, CEA and CERC (the "Consumer Electronics Parties") supported the consumer electronics / cable "Plug & Play" framework on

---

[1] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) ("Oct. 9, 2003 Second R & O and SFNPRM"); Joint Petition for Reconsideration of NMPA, ASCAP, SGA, and BMI (Dec. 29, 2003) ("Joint Petition of Music Publisher Parties"); Petition for Reconsideration of the Motion Picture Association of America, Inc. (Dec. 29, 2003) ("MPAA Petition"); Petition for Reconsideration of DirecTV (Dec. 29, 2003); Joint Petition for Reconsideration of BMI and ASCAP ("BMI and ASCAP Petition") (Dec. 24, 2003); Petition for Reconsideration of Genesis Microchip, Inc. ("Genesis Petition") (Dec. 29, 2003); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Petition for Reconsideration of the National Cable & Telecommunications Association ("NCTA Petition") (Dec. 29, 2003).

[2] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Joint Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition in Response to Further Notice of Proposed Rulemaking (Mar. 28, 2003) ("Consumer Electronics Industry Comments").

[3] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Joint Reply Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition in Response to Further Notice of Proposed Rulemaking (Apr. 28, 2003) ("Consumer Electronics Industry Reply Comments").

which the Commission requested comments. In separate comments filed on February 13, 2004,[4] the Consumer Electronics Parties responded to additional questions posed by the Commission in its Second Further Notice of Proposed Rulemaking.[5] Now the Consumer Electronics Parties respond jointly to the pending petitions for reconsideration. Except for the specific cases discussed below, the Consumer Electronics Parties do not believe that these petitions have merit.

I. OVERVIEW – THE IMPLIED LOGIC OF SEVERAL PETITIONERS – THAT WHERE TRIGGERING OF A TECHNOLOGY IS NOT SPECIFICALLY PROHIBITED USE OF THE TECHNOLOGY SHOULD BE CONSIDERED MANDATED -- MUST BE REJECTED BY THE COMMISSION. NOR IS THERE ANY OTHER BASIS FOR THE COMMISSION TO MANUFACTURE NEW PRODUCT MANDATES OR RESTRICTIONS ON TECHNOLOGY.

The Consumer Electronics Parties see a common implied theme in several of these petitions – that if the triggering of a technical imposition on consumers is *not prevented* by FCC Encoding Rule regulations, it should be considered that the Commission has *mandated* the incorporation of the related technology in devices. The FCC's Encoding Rule regulations,[6] like the "Encoding Rules" found in Section 1201(k) of the Digital Millennium Copyright Act[7] and such rules in private license agreements,[8] exist *because* technology mandates exist. The converse is not true. Encoding Rules are not meant to, and do not, signify, create, or impose any mandate. In other words, Encoding Rules are *limitations* on what otherwise would be an unchecked exercise of power over consumers and technological innovation.[9] They are not technological prescriptions. This important distinction seems not to have been appreciated by several petitioners, who claim that the Commission erred by failing to incorporate (1) an

---

[4] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the Consumer Electronics Association in Response to Second Further Notice of Proposed Rulemaking (Feb. 13, 2004) ("Feb. 13, 2004 CEA Comments") and Comments of the Consumer Electronics Retailers Coalition on Second Further Notice of Proposed Rulemaking (Feb. 13, 2004) ("Feb. 13, 2004 CERC Comments").

[5] *Id.* With respect to some issues, CERC endorsed the CEA comments rather than burden the record with a duplication.

[6] Oct. 9, 2003 Second R & O and SFNPRM, Appendix B.

[7] 17 U.S.C. §§ 1201 *et seq.* ("the DMCA").

[8] *E.g.,* the "5C" license; *see* http://www.dtcp.com.

[9] *See* DMCA, Pub. L. No. 105-304, § 103, 112 Stat. 2360 (codified in 17 U.S.C. §§ 1201 *et seq.*); H.R. Conf. Rep. No. 105-796, at 70 (1998); Oct. 9 Second R & O and SFNPRM ¶ 54).

Encoding Rule exception permitting a certain practice (*e.g.*, Selectable Output Control), and (2) an accompanying technological mandate.

The Commission did not err because Encoding Rules, whether created via legislation, license, or regulation, neither impose nor imply such mandates and were never meant to do so. ***CEA and CERC would strongly oppose FCC adoption of an "all restrictions whose use is not forbidden have been mandated" doctrine***. It would threaten consumers directly and would chill technological progress. It would threaten law and policy by implying an inexplicit, uncontrolled and uncontrollable expansion of the Commission's jurisdiction in the absence of any congressional guidance.

Some of the parties carry their pleas a step further. The Music Publisher Parties[10] seek an implied mandate in a substantive area – musical works – that is not the subject of this proceeding. And, the MPAA would like a mandate for Selectable Output Control technology even though the triggering of such technology *is* prevented by the FCC Encoding Rule regulations. Certainly there is no basis in the Encoding Rule regulations for such a notion and, as the Consumer Electronics Parties demonstrate, there is no other reasoned or jurisdictional basis for the imposition of such a mandate.

Another thread running through these Petitions is the notion that *the convenience of content originators and distributors should trump law and regulation*. ASCAP and BMI ask the FCC to declare them, and only them, immune from the operation of Section 1201 of the DMCA, and exempt from any intellectual property obligations to licensors of content protection technologies.[11] MPAA similarly pleads that its members should have the option of disabling millions of consumers' products because these studios may wish to avoid paying licensing fees for the technology that protects *their own* content.[12] MPAA also seeks immunity for its members if FCC regulations conflict with the members' contractual choices.[13] ***The Commission should dismiss all of this as poppycock. Content providers should be expected to respect laws, regulations, and valid license obligations that they may encounter in their content protection efforts.***

---

[10] Joint Petition of Music Publisher Parties at 2-4.
[11] BMI and ASCAP Petition.
[12] MPAA Petition at 2-4.
[13] *Id.* at 9-10.

II. THE COMMISSION SHOULD NOT BLESS MPAA'S ATTEMPTS TO TURN THE ENCODING RULES ON THEIR HEAD SO AS TO COMPRISE A MANDATE RATHER THAN A LIMITATION, AND TO SUBORDINATE FCC REGULATIONS TO ITS MEMBERS' CONTRACTUAL CHOICES.

The MPAA argues for some ill-defined change in Encoding Rule regulations so as not to prohibit the use of Selectable Output Control triggers in all circumstances, as the Encoding Rules presently do. Based solely on such a vague contingency,[14] MPAA argues for some mandated technological imposition, on Unidirectional Digital Cable Products ("UDCPs"), of an obligation to respond to such triggers. Even if the Encoding Rule regulations were to be changed in the future so as no longer to provide a complete bar to the use of such triggers, it would not and should not be inferred that the FCC is also mandating the incorporation of SOC response technology in licenses and in licensed products. But the MPAA's proposed change to the Encoding Rules should be rejected, so the notion of a mandated trigger should not even arise.

MPAA makes several other proposals based on a desire to be held aloof from the import of FCC regulations – even those adopted in response to copy protection pleas of its own members. All such proposals should be rejected.

A. CEA And CERC Strongly Object To Any Change In The Rule Against Selectable Output Control And Oppose MPAA's Bootstrap Attempt To Fashion A Selectable Output Control Mandate.

"Selectable Output Control" ("SOC") is the discretionary triggering of instructions to a home device, via a code from the program's originator or distributor, to turn off *any or all* home interfaces at the first point at which signals emerge from a navigation device, for transmission to a display or to another home network component. Such remote control over consumer home viewing (and recording) could be imposed without warning on a program-by-program basis and entirely as a matter of content owner or distributor discretion. It could be imposed because, in the sole and unfettered judgment of the content provider or distributor, one interface seems more secure than another, or because the favored interface does not support home recording as protected by Encoding Rules. Warning to the consumer that such a remote choice has been made would seem, by definition, impossible: the act of *turning off* the interface precludes the posting of any notice to a consumer, via the interface, as to why it is not functioning, or when it

[14] *Id.* at 2-6. MPAA did not include any proposed amendment to FCC regulations.

might again be available. So, a consumer would have no way to distinguish a choice made by a program originator or distributor from technical malfunction. The Commission, in its Encoding Rule regulation, rejected the triggering of SOC for very sound reasons:

- SOC makes a mockery of the rest of the Encoding Rule regulations, by allowing a content provider or distributor simply to *turn off* any interface that is capable of performing consumer home networking and recording tasks that are protected by the Encoding Rules.

- SOC puts consumers at the severe risk of losing all HDTV functionality, even of products with "secure" digital interfaces, and even though the consumer may have no networking or recording capability.

- SOC vastly complicates the reliable connection of components at a home viewing station, leading to frustration, service calls, non-receipt of paid for programming, and a loss of credibility for the digital transition itself.

- SOC is inherently resistant to any system to even *warn* consumers that a display has gone dark as a result of SOC having been triggered.

- No rationale whatsoever has been advanced for requiring an SOC response in UDCPs.

SOC is a threat to HDTV itself. A consumer who has invested, for example, in a display with a copy-protected 1394 interface, and in a digital video recorder that operates through that interface, could find, without warning, that her HDTV viewing has been disabled. If SOC is triggered to turn off *both* her 1394 interface and her Component Video interface, she will have ***no connection available that is better than NTSC***. And, in addition to her display having been degraded back to the analog era, her ***DVR with a "secure" digital interface will be useless***, because it relies on the copy-protected 1394 interface that has been turned off by the SOC trigger.

Even those consumers who *do* own HDTV displays that include the (non-recordable) interface currently favored by many studios, DVI / HDMI, could be severely impacted by the triggering of SOC. Most displays with DVI or HDMI inputs have only *one* such input, but consumers are likely to have *several* digital source devices in their home. Imposition of SOC would wreck these consumers' daily viewing practices too. For example, a consumer (or the service professional setting up that consumer's system) who has a DVD player (which may be HD in the near future) or an HD DVR is likely to use the DVI / HDMI input to accommodate

this component, and the 1394 (if present) or component video interface to accommodate the HD set-top box for an MVPD service. ***The application of SOC to the 1394 or component video system would wreck this consumer's viewing practices just as surely as if the consumer did not have any DVI / HDMI interface at all.***[15] ***It would also deny, to this consumer, the home recording practices that the Encoding Rules are meant to secure.*** Yet, what could this consumer – who has purchased a state-of-the-art display with *every* interface presently available in the marketplace – have done differently?[16]

1. MPAA actually is seeking an implied FCC design mandate over all new products.

MPAA now grudgingly states its willingness to accept Commission "oversight of selectable output control,"[17] but still offers nothing in the nature of a limitation on the program-by-program, random (from the consumer's viewpoint) nature of this technique that makes it so perverse toward consumers' quiet enjoyment of their products. Though vague as to what specific change to ask for in FCC Encoding Rule regulations, MPAA still insists that there must be Commission authority to order a *product design mandate* in the expectation of some future amendment. MPAA finally seizes on "the Commission's supervisory authority over the DFAST license."[18] This reference is chimerical:

- The Commission has exercised authority over DFAST only to the extent of inviting *licensees* who are concerned over license provisions to file a specific petition over that provision,[19] and agreeing to hear appeals from CableLabs determinations as to new outputs.[20]

- MPAA is actually, as discussed above, seeking an FCC mandate for *all* products, not just DFAST-licensed products. Although MPAA has not yet spelled out for the record the

---

[15] Alternatively, if the consumer relied on the DVI interface to the MVPD set-top box, it would not be available for the DVD player or the DVR, which might have no other HD output.

[16] It is unreasonable and counter to FCC precedent to suggest that a consumer would or should be able to physically rewire his or her home system every time an interface ceases to work, or work satisfactorily, due to SOC or downres, particularly if the system has been installed by a retailer or customer servicer and the wires are hidden from plain view. *See Turner Broadcasting v. FCC*, 520 U.S. 186, 220-21 (1997); Pub. L. 102-385.

[17] *Id.* at 3 n.3.

[18] *Id.* at 2-4.

[19] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling ¶ 29 & n.71 (Sept. 18, 2000) ("Sept. 18, 2000 Ruling"). The Commission made this statement in the context of the PHILA license. Arguably its willingness to entertain licensee complaints applies to DFAST as well.

[20] Oct. 9, 2003 Second R & O and SFNPRM ¶¶ 77-79.

sorts of programming as to which it would ask blessing to apply SOC, such programming is likely to involve the earliest window interactive programming services, rather than the canalized programs offered by DFAST-licensed products on a non-interactive basis.

2. The FCC does not have jurisdiction to impose a mandate of the pre-emptive breadth suggested by MPAA.

The MPAA has not cited, and cannot cite, any congressional intention or delegation of authority for the FCC, on its own motion, to pile additional mandates onto consumer devices, when no such requirement exists elsewhere in law or in the license from the representatives of cable service providers. Prior to the FCC's September 18, 2000 Declaratory Ruling, MPAA confined its case to arguing that the FCC's regulations limiting license impositions on competitive entrants should be interpreted ***so as to allow the DFAST licensor (CableLabs) to include some copy protection provisions. Otherwise, MPAA said, the entry of competitive products not sourced from an MVPD would break the contractual chain of privity from content owner to content distributor to device producer***.[21] The FCC accepted this argument to a limited extent. It ruled in September 2000, that *some degree* of copy protection, as the *licensor's requirement* in the DFAST Compliance Rules, could be justified on this basis.[22] In October 2003, it adopted Encoding Rules as a *limitation* on the power that the licensor (and the licensor's licensor) could exert over consumer product licensees, and thus over consumers, on this basis.

Now, the MPAA apparently has dropped the argument that it seeks *only* to restore its members' contractual privity as licensors. MPAA now asks the Commission to substitute a mandate of its own, even where MPAA members have *not* negotiated with MVPDs for any license requirement, and even though the FCC has *not* allowed SOC triggering in its own encoding rules. Such a result would be an unbounded expansion of the Commission's determinations on September 18, 2000, and October 9, 2003, and of the FCC's jurisdiction itself.

3. The "patent infringement" argument is a makeweight at best.

In looking for new arguments on reconsideration, MPAA suddenly finds SOC necessary as a shield against future IP litigation, or because an MPAA member ***might not wish to pay any***

[21] Letter from Fritz E. Attaway, Sr. V.P. Government Relations, MPAA, to Magalie R. Salas, Office of the Secretary, FCC, CS Docket No. 97-80 (Sept. 6, 2000).
[22] Sept. 18, 2000 Ruling ¶ 29.

longer for the use of a protection technology.[23] MPAA has sought the FCC's assistance in enforcing its licenses; it seeks courts' assistance in enforcing copyrights; and it has repeatedly gone to the Congress to have the terms of such copyrights extended. Content owners have already acquired the power to trigger functions in hardware devices; they can certainly bear the intellectual property risks that go with such power.[24] As Harry Truman observed, "If you can't stand the heat, stay out of the kitchen."

MPAA members have achieved, or have been offered, content participant status in most widely used license agreements; the Commission is now considering how technology and interface determinations will be made. The MPAA and its members expect to have a say there too. MPAA and its members often remind the Commission that, even where triggering is not prohibited by Encoding Rules, it is a marketplace choice whether to actually trigger copy protection. ***Content providers are no more entitled to insulate themselves from the risk of IP litigation than are any of the other participants in the marketplace.***

Yet, instead of its members bearing normal commercial risks – the same risks as are assumed by device manufacturers every day -- MPAA proposes that, to avoid any such risk, its members be granted a unique power to surprise and disappoint law-abiding consumers. These consumers did not ask for copy protection features to be included in products, but paid for them anyway. Consumers have accepted enough of the content providers' commercial risks. They should not have to accept SOC on this basis too.

4. MPAA misstates the context and use of "revocation" in raising issues already reserved for the FNPRM.

Although in its SFNPRM Comments MPAA pleaded "mea culpa" for having used the term "revocation" so broadly in the past, it again in its petition grasps toward a "revocation"

---

[23] MPAA Petition at 3-4.

[24] Moreover, the MPAA has done nothing to show that such a legal risk palpably exists, no less that any such risk justifies the imposition of unilateral controls that could irreparably damage both consumer interests and the DTV transition. MPAA does not submit any statute, case law or other explanation as to how the setting of some generic trigger by itself could expose its members to liability. Indeed, MPAA has noted in a separate proceeding, when making this same argument, that it is unaware of any patent infringement allegations being asserted or threatened against its members, and does not concede that such allegations would be valid. *See In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of the Motion Picture Association of America, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and The Walt Disney Company at 7 & n.6 (Feb. 13, 2004).

argument as a justification for SOC.[25] Clearly, the subject of "retirement" of outputs is the same subject on which the Commission asked for Comment in its SFNPRM. It is not a separate basis or justification for burdening consumers, by putting SOC discretion in the hands of content originators and distributors.

B. Procedures For Challenging "New Business Models" Should Not Be Restricted As Proposed By MPAA.

MPAA's proposal to change the Commission's procedure for dealing with launches of Undefined Business Models[26] is premature, because the FCC has not yet published any such procedure or gained any experience with notices or objections. MPAA worries that the Commission expanded the number of interested parties who could advise the FCC of concerns about a new business model, and cites this worry in an effort to shorten the complaint period that was recommended in the MOU and adopted by the Commission.[27] MPAA's concerns are hypothetical and, at least in the absence of implementing regulations or precedent, there is no clear relationship between the number of parties and the time period allowed. CEA and CERC believe that the period fixed by the Commission is appropriate, as it allows real-world experience to be gathered if necessary, rather than for all arguments to be based on hypotheticals and suppositions.

C. MPAA's Proposed Change To Section 76.1908(a) Should Be Rejected. Although MPAA's Concern May Have Some Basis, A Different Remedy Should Be Applied.

MPAA expresses a concern over possible MVPD intentions to operate "a PVR in a consumer's home that receives CA-controlled content before CableCard decryption."[28] MPAA's specific concern is that this arrangement would give an MVPD a power to perform activities that it views as barred by its members' contracts with MVPDs. The Consumer Electronics Parties, in the context of questions asked by the Commission in the Broadcast Flag proceeding, have expressed equal or greater concern over this prospect and regard it as in contravention of both

---

[25] *Id.* at 2-4.
[26] *Id.* at 7-9.
[27] In other contexts, *e.g.*, CableLabs licensing decisions, MPAA itself has complained that too few parties can make initial complaints about decisions. CEA and CERC support the MOU framework as it pertains to Phase I, and hence to this reconsideration proceeding.
[28] *Id.* at 9-10.

Section 629 and FCC regulations.[29] However, both MPAA's reading of this Encoding Rule and its proposed remedy are misplaced and objectionable.

1. MPAA Is Incorrect In Fearing That Section 76.1908(a) would approve a practice and thereby empower an MVPD to ignore other regulations.

Section 76.1908(a), like other Encoding Rule regulations, is a limitation on triggering practices. Encoding Rule regulations do not confer approval on technical practices generally, and certainly cannot confer approval on a practice that would violate other elements of the FCC regulatory framework. Section 76.1908(a) simply says that the *Encoding Rule* shall not be construed as preventing an MVPD from using certain copy protection encodings that do not change consumer outcomes when implemented in a system or in a (competitive) navigation device. Section 76.1908(a) does not explicitly or by implication approve every related MVPD practice if that practice would violate congressional intent or FCC regulations.

2. The related practice MPAA is concerned about would be contrary to law and regulation, but MPAA's proposed remedy is misplaced.

As the Consumer Electronics Parties discussed at length in their respective Broadcast Flag FNPRM filings,[30] the reason MVPDs should not be able to do what MPAA is worried about is entirely unrelated to the Encoding Rules. To subject an entire consumer home network to cable headend control through source encryption, via unique devices that are *not* available competitively, would violate both Section 629 and the regulations that the Commission has issued to date. It would also tend to freeze out competition from alternative providers, such as DBS operators. Nothing in the Encoding Rules addresses or blesses such a practice, explicitly or by implication. The Consumer Electronics Parties hereby incorporate by reference their arguments made in the Broadcast Flag proceeding on this point.

---

[29] *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Consumer Electronics Association Comments on Further Notice of Proposed Rulemaking at 2-3, and Consumer Electronics Retailers Coalition Comments on Further Notice of Proposed Rulemaking at 1-3 (Feb. 13, 2004).

[30] *Id.*

3. A need to change content provider contracts should not be grounds for reconsideration.

While the Consumer Electronics Parties share MPAA's substantive concern over this potential cable industry practice, they do not buy into the idea that the FCC should be powerless to regulate wherever the regulation would be inconsistent with a private sector contract. If the feared practice *were* permissible under law and regulation, inconsistency with a content provider's existing contract should not be enough to force reconsideration.

III. THE CONSUMER ELECTRONICS PARTIES OPPOSE THE ATTEMPT OF THE MUSIC PUBLISHERS TO BOOTSTRAP THE ENCODING RULES INTO A TECHNOLOGY MANDATE.

The filing of the Music Publisher Parties also proceeds from the erroneous premise that the Commission should govern by mandate any and every technological area addressed by an Encoding Rule regulation. It proceeds from this premise to a discussion that is substantively irrelevant to the rights being licensed by MVPDs that are made subject to Encoding Rules.

A. Plug & Play Technical Compliance Rules Are Determined By Those Licensors Who Can Prevent The Distribution Of Content, And Governed By Encoding Rules That Limit The Power That Such Licensors Can Exercise.

The Music Publisher Parties condemn all the Commission has done on the basis that the FCC "arbitrarily and erroneously" fails to protect the audio channel of digital television programming while simultaneously prohibiting petitioners from employing copy protection measures. This condemnation is baseless on several counts:

- The FCC has not, in the Second Report & Order and the SFNPRM, "protected" anyone's programming. It has established a regulatory framework for the interoperation of audiovisual networks and devices, and has approved a framework for *licensors* to impose Compliance and Robustness requirements on devices (directly or indirectly), subject to Encoding Rule limitations.

- The license chain for the distribution of audiovisual content includes the rightsholders to the audiovisual work, the distributors of the work, and the distributors' agent for device licensing purposes, CableLabs. NMPA and its members are not among these licensors.

- Commission handling of Plug & Play is different from that of Broadcast Flag because Broadcast Flag involves a Commission protection mandate on consumer devices not subject to MVPD license, whereas Plug & Play does not.

The subject of Section 629 is competitive availability of navigation devices for any service provided by a Multichannel Video Programming Distributor. This has been the subject of FCC implementation since 1997. As we discuss above, Encoding Rules arise because (1) licensors of audiovisual programming seek contractual privity with device manufacturers through the DFAST license, and (2) Encoding Rules provide a limitation on the unilateral power that might thereby be exerted over consumers via a license that is required of every competitive entrant. The Encoding Rules are thus limitations on the licensing power of entities other than the Music Publishers and their members.

So, even a favorable provision in the Encoding Rule regulations would not imply any substantive mandate to impose technical measures on audio content, nor would there be any mechanism by which the Commission might establish one. Compliance obligations, including obligations regarding audio outputs, are addressed in the DFAST license. They are not addressed in the Commission's regulation and are certainly not addressed by implication in the Encoding Rules.

B. The Music Publishers' Discussion Of The Relative Numbers Of AudioVisual And Audio "Legacy" Devices Is Not Relevant, And The FCC Has Not Taken Any Final Action That Would Disenfranchise Legacy A/V Sets.

The Music Publishers are factually incorrect in alleging that the FCC has disenfranchised any audiovisual devices. The FCC has not as yet issued any final determination with any such effect. Hence, there is no basis for any analogous imposition on consumers' enjoyment of music.

The argument at p. 8 of the Music Publishers' Petition also seems to be based on an assumption that operation of the DFAST license will automatically disenfranchise digital televisions "without digital decryption capability." While SOC, proposed on reconsideration, could do this, and "downres" would devalue DTV displays, the argument misstates the problem. In approving the DFAST license the FCC has not inherently abandoned legacy displays. If the FCC does not embrace SOC and decides, on the SFNPRM, not to embrace HDTV downresolution, these displays will not be disenfranchised at all – set-top devices would still be available to fully serve legacy products that are not themselves capable of decryption. (This is fortunate, because the publishers' numbers are much too low: the number of DTV receivers that

would be harmed by HDTV downresolution is 6 million and counting; the number potentially harmed by Selectable Output Control is 8 million and counting.[31]).

Although the Music Publisher Parties have not made a specific technical proposal, it appears that the same benign effect on legacy devices would not to be the case under the regime they propose. Apparently consumer use of legacy devices *would* be frustrated by some new encryption regime.

C. Comparisons Of This Proceeding And The "Broadcast Flag" Betray A Fundamental Misunderstanding Of The Origins And Nature Of This Proceeding.

This proceeding is aimed fundamentally at complying with Congress's instruction, in Section 629, that the FCC in its regulations assure the competitive commercial availability of navigation devices from competitive entrant manufacturers and retailers, without compromising MVPD security concerns. Unlike the broadcast flag, it is not aimed at addressing a protection goal for copyright owners, though such goals have been found to be relevant to the security concerns of MVPD distributors. Nor is this proceeding, like the broadcast flag, addressed to devices that are not subject to any compliance licensing regime. Hence, the comparisons made to the Broadcast Flag proceeding, as to why audio is not even addressed, are fundamentally off base.

D. It Is Incorrect To Assert That The FCC Has Required Any "Minimum Protection" On AudioVisual Signals.

An element of the Music Publishers' basic misunderstanding is the belief that, in this proceeding, the FCC has dictated any "minimum protection" for audiovisual signals. As the Consumer Electronics Parties discuss at length above, it has not. Nor is there any requirement, imposed by the FCC or otherwise, that the licensors' technical requirements approved in this proceeding, and the Encoding Rules that limit the use of triggers, must track the copyright rights and protections available to content owners. As the FCC was at pains to point out in its October

---

[31] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Home Recording Rights Coalition Comments on Further Notice of Proposed Rulemaking, Appendix A (Feb. 13, 2004).

9, 2003 Second Report & Order, those rights of content owners (*e.g.*, to pursue copyright litigation) remain unaffected.[32]

E. Compliance With FCC Encoding Rules Does Not Entail Any Violation Of The Digital Millennium Copyright Act.

The Music Publishers' essential confusion is illustrated by the argument that the Encoding Rules, by limiting the use of certain triggers, would somehow violate the DMCA. This betrays circular thinking. A violation of the DMCA would be possible only if some technical protection measure were lawfully applied to a signal, and then was "circumvented" by someone not having the right to do so. NMPA erroneously assumes that processing in the course of delivering a signal to a consumer, subject to a train of licenses, would somehow violate the intellectual property rights of the licensor at the top of the chain. But a DMCA violation can occur only where someone presumes to exercise a right reserved to someone else.[33] In this case, the content provider would not have the right to encode contrary to the FCC's Encoding Rules. If the initial licensor has complied with the Encoding Rules, there is no issue. If the licensor has violated the Encoding Rules, his licensee is not "circumventing" by complying with them.

F. The Purported Audio Home Recording Act Issues Posed By NMPA Are Irrelevant To This Proceeding.

No UDCP, by definition, is a "Digital Audio Recording Device" under the Audio Home Recording Act. The Music Publishers, whose members collect royalties under that Act, should be aware of this. In tossing in this argument,[34] the Music Publishers ignore both the definition of "Digital Audio Recording Device" (one whose recording function "is designed or marketed for the primary purpose of" making a copy of a copy of an audio recording in a digital format)[35] and its construction in the *Rio*[36] case, as excluding any device that copies from a storage medium containing audiovisual or other non-audio data.

---

[32] Oct. 9, 2003 Second R & O and SFNPRM ¶¶ 9, 52, 54.
[33] 17 U.S.C. § 1201.
[34] Joint Petition of Music Publisher Parties at 12-19.
[35] 17 U.S.C. § 1001(1), (3).
[36] *Recording Ind. Ass'n of Am. v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072 (1999).

IV. DIRECTV'S PROPOSALS ARE BASED ON MISUNDERSTANDINGS AND MISCONSTRUCTIONS OF THE PURPOSE AND EFFECT OF FCC REGULATIONS AND OF SECTION 629.

In its prior filings and in this petition, DirecTV has not yet shown any injury as a result of anything the Commission has done in this proceeding. Nor has it established any substantive basis for reconsideration.

A. DirecTV Has No New Objection Or Unique Concern Over The Encoding Rule Regulations.

As the Commission noted in its resolution of DirecTV's March 28, 2003 FNPRM Comments,[37] DirecTV's complaint re Encoding Rules is procedural, not substantive: while DirecTV did not participate in the formulation of the recommendations, it had the opportunity to submit its views to the FCC before the Commission issued its rules. No DBS provider could cite any specific injury as a result of the Encoding Rules, which apply equally to all MVPDs, and which largely reflect bargains made by the cable and satellite MVPDs' common program suppliers. The elements complained of are either technological and unique to cable, so irrelevant to DirecTV; or pertain to Encoding Rules that are limitations on constraints applied by program originators. No issue is unique to a DBS provider.[38]

B. Application of Section 629 And Of Encoding Rules To Internet Distribution Is A Subject Congress Has Reserved For Itself.

It seems contradictory to question the Commission's jurisdiction over all MVPD navigation devices,[39] then to assert that the Commission should exert even *broader* jurisdiction, over Internet non-MVPDs. The Commission is acting under instructions from the Congress. It was explicitly instructed to achieve competitive availability of navigation devices for services offered by MVPDs. This includes DBS providers, but does not include Internet providers. In recognition of this fact, the parties to the MOU agreed that, once the Encoding Rules have been

---

[37] Oct. 9, 2003 Second R & O and SFNPRM ¶ 43.

[38] In their SFNPRM Comments, the Consumer Electronics Parties, in the course of objecting to NCTA's rationale for encrypting the basic cable tier, did observe that use of headend source encryption on home networks would have the effect of locking out competitive products, including those of DBS providers. At present, however, this is a private party's proposal and has not been adopted by the Commission so is not relevant to consideration of DirecTV's reconsideration petition.

[39] Petition for Reconsideration of DirecTV at 2-3 & n.5.

finalized in FCC regulations, they would seek legislation to extend their coverage to Internet providers.

C. An FCC Mandate Of Implementation Standards For IEEE 1394 Is Not Necessary.

DirecTV agrees that the Commission should "refrain from requiring television manufacturers to implement IEEE 1394 connectors,"[40] but requests that the Commission set product standards for those that do implement IEEE 1394. This is a narrow line to walk. Just as there is no evidence that requiring a 1394 connector is necessary, no evidence has been presented that an implementation standard is necessary either.

Underscoring the problem with casual interface mandates, DirecTV incorrectly requests that televisions with IEEE 1394 interfaces be required to support the full capabilities of CEA-861, which is a profile standard for DTVs using the DVI interface and has nothing to do with IEEE 1394. The rules related to IEEE 1394 support in High Definition set top boxes reflect exactly the standards the parties intended to specify, knowing that televisions would in turn match those interfaces. Furthermore, CEA conducted one CEA-775/IEEE 1394 "plugfest" interoperability event with MVPD vendors and television manufacturers last year, has another planned for April, and will likely conduct a third in the fall. There is no evidence that any manufacturer intends to do anything other than create fully interoperable products based on the relevant standards.

While an FCC assurance might provide a level of comfort, it should be recognized that consumer electronics manufacturers and retailers who offer products with 1394 interfaces have every incentive to specify interfaces that mate with DBS, as well as with cable, products. To do otherwise would be against their own interests. Unless DBS providers can come forward with evidence, of which CEA and CERC members are presently unaware, that cable operators have attempted to coerce consumer electronics manufacturers or retailers to limit the functionality of 1394 interfaces, the requirement seems unnecessary. One may expect that any such attempted coercion would be brought to the attention of the Commission.

---

[40] *Id.* at 6.

D. There Is No Evidence At Present That CableLabs Will Refuse To License Entities Under DFAST Or That DirecTV Would Be Harmed In Such Case.

DirecTV next argues that "it may be possible for noncable MVPDs to utilize and enhance" DFAST technology, and on this basis argues that CableLabs should be disqualified as administrator of the DFAST license.[41] This procedural argument also lacks substantive example. In the event that cable MSOs were allowed to deploy unique, embedded security devices as home network "gateway" devices that required any other device on the system to use a POD ("CableCARD"), the Consumer Electronics Parties, as we have noted, would join DBS parties in objecting. Such a home network architecture would damage both competitive consumer electronics devices *and* DBS devices. While the Consumer Electronics Parties would strongly oppose the deployment of any such architecture as contrary to Section 629 and present FCC regulations, even under such a circumstance there is no present evidence that CableLabs would refuse to allow DBS providers to become DFAST licensees.

It may be the case that CableLabs would be more reluctant to license a DBS provider to supply CableCARDs as conditional access devices for use on DBS systems (either using the same source encryption as a cable provider, or using other source encryption). Such a situation, however, at present is hypothetical. The Consumer Electronics Parties cannot address it in the absence of some factual circumstance, nor should the Commission. However, the Commission's oversight of navigation device issues, embracing all MVPDs, should cause it to be responsive in the event that any such issue should arise.

E. DirecTV's Plea For An Injunction As To "Phase II" Negotiations Is Not A Proper Subject For This Petition.

One may understand why, for strategic reasons, DirecTV asks the Commission for a place in the bidirectional discussions on a "Phase II" framework for interactive products. While these discussions are, indeed, clearly within the purview of the Commission's jurisdiction and oversight, they are not within the purview of any action taken by the Commission in its October 9 Second R & O. (The Commission and the Commissioners did note their expectations in this regard as a matter of oversight, however.) Hence there is no Commission action to reconsider.

---

[41] *Id.* at 7.

V. CEA AND CERC OPPOSE THE REQUEST OF BMI AND ASCAP FOR COMPULSORY LICENSES TO UNSPECIFIED INTELLECTUAL PROPERTY.

Although the contest is spirited, perhaps the prize for the biggest requested stretch of Commission jurisdiction in this proceeding should go to ASCAP and BMI, for their plea that the Commission grant them immunity from an act of Congress, the DMCA, an Act whose enactment they supported vigorously. The Commission has no such power and, if it did, ASCAP and BMI have suggested no competent rationale for its exercise.

A. There Is No Competent Rationale In This Proceeding For The Relief Requested.

BMI and ASCAP petition for reconsideration because the Commission did not include any provision granting them the power to decrypt any digital rights management method adopted by the Commission solely for the purpose of performance monitoring and copyright royalty distribution.[42] This request is rife with misunderstanding:

- The Commission has not "adopted" any digital rights management method in this proceeding. It has recognized DFAST Compliance Rule requirements. These and any other MVPD impositions on device manufacturers and consumers are tempered and limited by its Encoding Rule regulations.

- To the extent the Commission has recognized or not prohibited Compliance Rule requirements, these technologies are (1) adopted by a licensor, not the Commission, (2) pertain to audiovisual distribution rights not licensed by ASCAP and BMI members, and (3) govern use of content ***in the home network***. Apparently, then, ASCAP and BMI ***seek a DMCA exemption from the FCC in order to monitor consumer home network usage.***

- Assuming ASCAP and BMI have some valid interest in monitoring consumer home network usage, they have not alleged that they have been denied a license by any rights licensor to do so. Thus they advance no reason why the FCC should intervene to nullify an Act of Congress, even if it could.

B. The Commission Lacks The Power To Grant A Compulsory License To ASCAP And BMI Or To Nullify An Act Of Congress.

ASCAP and BMI ask for something that is well beyond the FCC's power to grant. Viewed most charitably, the request is for a compulsory license on terms more favorable than those made available to others by the licensors of technologies required in DFAST Compliance

[42] BMI and ASCAP Petition.

Rules. Viewed less charitably, the request is for the right to break encryption unilaterally, and to infringe intellectual property, because decryption ordinarily requires a key furnished under license. It appears that these copyright rights collection societies are asking the FCC somehow to grant them authorization to ignore (1) the DMCA, which in Section 1201 would seem to label such conduct as "circumvention," and (2) the intellectual property that would be infringed by unauthorized decryption. ASCAP and BMI do not suggest how the FCC has such power, or how the FCC could acquire it.

VI. GENESIS HAS NOT STATED ANY REASON FOR THE FCC TO REVISE ITS REGULATIONS.

Genesis Microchip bases its Petition substantially on a misreading of Section 629, and on a misunderstanding of the necessary relationship between technological *specifications* and technological *standards*. Indeed, in the course of the Petition, the two phrases often are used interchangeably, hence incorrectly.

A. Section 629 Does Not Require That The FCC Consult Exclusively With Standards Organizations Or Refer Exclusively To Their Output.

In quoting from a part of the first sentence of Section 629, Genesis gives the impression that the Commission was told by the Congress to consult *exclusively* with standards organizations whenever any technology is involved. This reading is far from accurate. The full opening sentence reads:

> The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[43]

This provision does *not* require that every part of every technical regulation or technology involved in the broad regulatory and oversight scope assigned to the Commission must be the *product* of a standards process. Nor does it require that the "standards setting"

[43] 47 U.S.C. § 549(a).

organizations that are referenced must play an active role, or that they be "due process" organizations. Nor does it say that the output of a standards organization must be an input to a regulation. It simply says that the Commission, in the course of adopting its regulations to carry out the will of the Congress, must *consult* with "*appropriate industry*" standard-setting organizations. While these distinctions are not critical to resolving the Genesis Petition (because, *e.g.*, both DVI and HDMI *are* the subject of standards organization processes or rely on such processes), it is important to the future course of this proceeding that Congress's actual instruction be kept in mind.

CEA favors and supports all practicable involvement of due process standards-setting organizations, and, as Genesis admits, CEA *is* such an organization. Moreover, CEA and its members insisted that the DFAST license be based on due-process *standards*, rather than on changeable CableLabs *specifications*. It was this insistence, *inter alia*, that drove the creation of the DFAST Technology License alternative to the "PHILA" license, and hence drove the agreement on the MOU. Nevertheless, the Consumer Electronics Parties believe it to be important to technological progress that the difference between specifications and standards, and their respective roles in technological progress, be well understood.

As much as CEA members believe that standards should be relied upon whenever it is possible to do so, they also recognize that in many cases ***such standards arise as a result of the experience of implementing technical specifications in the field.*** So, while it may be preferable that standards activity precede deployment, this is not always possible or even advisable. ***What is more important is that appropriate standards activity follow deployment as expeditiously as is possible.*** Moreover, some technical elements – particularly involving encryption and authentication – are based on secrets that cannot themselves be subject to open standardization activity. Hence, it would have been ill-advised on several grounds for the Congress to instruct the FCC that every element involved in its regulations must pass through standard-setting first. The Congress did not even come close to doing so.

B. The DVI and HDMI Specifications Have Indeed Been The Subject Of Due Process Standards Processes Or Rely On Such Processes.

In its discussion of the "DVI and HDMI standards"[44] Genesis avers that they are in fact private specifications and does not refer to any standard-setting activity relating to them. This is a factual error. Genesis avers that, though CEA is a due-process standards organization, "CEA played no role in the development of the DVI and HDMI standards."[45] If Genesis, by "standards," is referring to the initial specifications, it is of course correct; associations and standards bodies are not there to invent technologies. If, however, Genesis is actually referring to "standards," it is incorrect. ***CEA has based the CEA-861 standard, whose current revision is CEA-861-B, on the DVI specification produced by the DVI working group ("DDWG") – see www.ddwg.org/faq.html.*** The HDMI specification, in turn, reflects development based on the CEA-861-B standard (adding remote control messaging and audio), which at present cannot be practiced without the use of the HDMI specification. Another standards-setting organization, VESA (though not ANSI-accredited as CEA is), has also based a standard on the work of the DDWG.[46]

The progression of technology from specification to standard to new specification is appropriate to spurring technological progress with maximum standardization. It has, in fact, been followed in this particular case, resulting in the rapid availability of new technologies to consumers. The FCC has not been constrained by the Congress to retard this process, nor should it wish to on its own motion.[47]

C. The FCC Did Not Prohibit The Use Of Interfaces Other Than DVI / HDMI, So The Argument That "Alternatives" Should Have Been Considered Is Inapposite.

---

[44] Genesis Petition at 14-15.

[45] *Id.* at 15.

[46] *See Corporate Backgrounder*, Video Electronics Standards Association ("VESA"), 2003, *available at* http://www.vesa.org/backgrounder.html.

[47] Genesis is again simply wrong in suggesting that the FCC ever considered such a course. Genesis quotes the FCC April 25, 2003 Order as stating an expectation (not a requirement) that "any specifications resulting from such negotiations would be subject to subsequent review and adoption by an appropriate organization." Genesis Petition at 12. A few lines later it mischaracterizes this statement as an expectation that "any cable/consumer electronics industry standards for bi-directional digital cable receivers **would not be adopted into law until** they had undergone review and adoption by an appropriate standards organization." *Id.* (emphasis added). The Commission never said this; it would have reflected a strange understanding of the word "subsequent," which accurately describes the usual industry process discussed above. The FCC has never in this proceeding required standards organization review *before* reference nor, for the reasons we discuss, should it.

Among the misstatements and misunderstandings inherent in the Genesis indictment of the FCC is the charge that the Commission "sought no public consideration of alternative display standards."[48] This criticism is based on a fallacy – that the FCC has set or chosen a standard to the exclusion of other technical approaches. The labeling requirement that, to use the DCR logo, certain products must have the DVI / HDMI interface, is neither absolute nor exclusionary. Any number of other interfaces can and, presumably, will be employed. Nothing that the Commission has done in order to ensure the interoperability of a specification (and a standard) that is coming into common use excludes the use of other interfaces as well. Indeed, as the Consumer Electronics Parties have argued, consumer home networking rights and expectations depend substantially on the continued availability of alternative interfaces. In fact, the Commission has directly imposed a mandate on service providers to support competitive products through the use, in MSO-provided set-top boxes, of one such alternative interface in copy-protected form, IEEE 1394.

VII. THE CONSUMER ELECTRONICS PARTIES SUPPORT THE PROPOSED CLARIFICATION TO FCC REGULATIONS REQUESTED IN NCTA'S PETITION SUBJECT TO CERTAIN MODIFICATIONS THAT CEA AND NCTA HAVE AGREED TO RECOMMEND JOINTLY.

CEA, NCTA and CableLabs have worked since the "MOU" to perfect a mutually agreed testing regime for use in the initial testing of UDCP products at CableLabs. In parallel, they have also examined the relevance of that regime to subsequent testing at an independent test facility, or via self-certification as envisaged under the FCC regulations. These FCC regulations refer to the testing tasks necessary to complete the test regime (and hence earn use of the "DCR" logo) in terms slightly different from (though not necessarily in conflict with) those employed in the MOU. At issue has been the proper relationship of tests and procedures referred to by several acronyms:

- The **PICS pro forma**, as cited in FCC regulations, are the substantive requirements to determine whether a UDCP product is "Digital Cable Ready" so as to earn the "DCR" logo.

- The **Acceptance Test Plan, or ATP**, is the method, mutually agreed to by CableLabs and CEA member television manufacturers, for testing compliance with the PICS.

[48] *Id.* at 2.

- The **Joint Test Suite, or JTS**, is the PICS plus the ATP.

At the time of NCTA's Petition For Reconsideration, the parties were still working out several testing issues, including how to understand the relationship of these terms under the regime adopted in the FCC rules.[49] CEA and CableLabs have now agreed on a joint proposal to the Commission to clarify its rules, and have agreed that this joint proposal should supercede the recommendation made in NCTA's Petition.

A. CEA And CableLabs Have Agreed On A Joint Recommendation For An Amendment To The FCC's Regulations Re Testing And Use Of the DCR Logo.

As the date of the first CableLabs "test wave" that would involve UDCP products approached, the parties engaged in an intensive discussion of their views and perspectives, and worked out a mutually satisfactory agreement to govern testing, coupled with a joint recommendation to the Commission on how the NCTA's reconsideration petition should be resolved:

- CableLabs agreed that manufacturers who accept this agreement will have the right, after the first model test at CableLabs, to in subsequent self-verification or independent lab verification testing employ an "Equivalent ATP" (that is subject to audit) for testing to determine whether a model has passed the PICS.[50]

- CEA agreed to recommend to the FCC, jointly with NCTA, specific regulation language clarifying that the ultimate reference for whether a product has passed the PICS should be the Joint Test Suite (and hence the test procedure as set forth in the ATP).

- A device manufacturer's acceptance via endorsement of this agreement includes an agreement that, in the event a product passing an "Equivalent ATP" is found to fail when tested by CableLabs according to the ATP, the product will be subject to CableLabs' remedies for cure, as set forth in the DFAST Technology License Agreement, *as if* this failure had constituted a violation of DFAST.

CEA hereby strongly recommends the adoption of the language in question. The entire agreement, as signed by CEA, is submitted to the Commission as an Exhibit to this filing.

---

[49] *See* discussion in Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, Re: CEA Status Report, CS Docket No. 97-80 (Jan. 21, 2004).

[50] In cases in which a manufacturer can certify that a "model" is so derivative of another "model" already tested that it will produce the same test results, the test process may include, or in an appropriate case constitute, a certification to that effect.

B. The Consumer Electronics Parties Believe That Implementation Of This Common Recommendation Will Spur Innovation And Avoid Product Introduction Delays Due To Testing; They Strongly Recommend The Accompanying Clarification Of FCC Regulations.

The Consumer Electronics Parties endorse the CEA / CableLabs / Manufacturers[51] agreement, filed as an Exhibit, because it represents a sensible, creative and good faith solution to a vexing problem. The DFAST Technology License Agreement does not impose any product certification regime. Instead, the MOU provided for self-verification testing after the first "model" had been tested in a laboratory. The parties did not have a precise understanding of the relevance of the ATP in the context of self-verification or independent lab verification, or whether the FCC's reference to the "PICS" also implied a mandatory reference to the JTS in the context of self-verification or of testing at labs other than at CableLabs. The parties also found defining "first model" to be vexing.

The agreement signed by CableLabs and CEA, along with the joint recommendation for clarification of the FCC regulations, provides a true marketplace solution. It preserves the ability of device manufacturers, subject to audit by CableLabs, to avoid redundancy, duplication, and delay, by allowing them to test and self-certify according to their own business judgment, *provided* that if the product should fail a test conducted via the JTS, it will be subject to the same remedies and cure procedures that were laid out so painstakingly in DFAST.[52] This gives manufacturers the ability to perform self-certification in a way similar to their practices in other commercial and regulatory contexts. They can make their own judgments, subject to potential rights and remedies of others, rather than have to wait according to some quasi-regulatory process. It gives CableLabs a means to proceed against manufacturers who may have abused this discretion. CEA signed this agreement and strongly recommends to the Commission the accompanying clarification of its regulations, which should assure that it will continue to work

---

[51] The agreement on use of an "Equivalent ATP" is optional on the part of individual manufacturers. Those not signing would be subject to the FCC regulations, if adopted, that reference the Joint Test Suite as a touchstone for PICS passage and the CableLabs Test Guidelines that refer to the JTS, without benefit of CableLabs' agreement with respect to their use of Equivalent ATPs.

[52] This does *not* mean that a product's failure of the ATP puts it or the manufacturer in breach of DFAST – only that the manufacturer has agreed with CableLabs that, at CableLabs' discretion, the product may be subject to CableLabs' remedies and cure procedures as set forth in DFAST in the event of an ATP failure.

even when initial testing may be available at a laboratory other then CableLabs.[53] CERC, whose members have an interest in an innovative market whose product development schedules are in the hands of the competitive manufacturers, endorses it as well.

C. CEA Has No Objection To NCTA's Proposed Clarification As To A Requirement To Test The First "TV."

The Consumer Electronics Parties also endorse NCTA's Proposed Clarification that, in addition to whatever else a manufacturer may choose to test at CableLabs or an independent laboratory, a manufacturer must test its first *television product* at such a lab.[54] UDCP products may implement only some of the features available on cable systems; hence their testing may not be complete. Only a *television* product requires testing of the panoply of cable television program features and functions that are the subject of the Joint Test Suite. CEA agrees with the NCTA position in this respect not because of the "Equivalent ATP" agreement discussed above, but because this was indeed the "MOU" recommendation.

D. CEA Has No Objection To NCTA's Proposed Clarifications With Respect To PSIP.

Similarly, CEA has no reason to object to the clarification with respect to PSIP data as sought by the NCTA.

E. The Security Concerns Discussed By NCTA Do Not Bear On The Issue Of Qualifications Of Independent Laboratories.

Although they have agreed with NCTA on a recommended clarification of the regulations with respect to testing, the Consumer Electronics Parties do not join in the discussion of security issues that precedes the original NCTA proposal, on which the parties have now reached a good faith understanding and joint recommendation. The inherent security of the CableCARD system and the DFAST Compliance Rule requirements do not critically depend on who conducts the tests. Therefore, the Consumer Electronics Parties treat the NCTA's security discussion as posing a separate issue, to which they feel constrained to respond for the record:

---

[53] Once testing of first models is available at a laboratory other than CableLabs, a manufacturer could have this testing accomplished without having to sign the CableLabs Test Guidelines. Hence, the regulation clarification is necessary to implement, in the long term, the touchstone status of the JTS.

[54] NCTA Petition at 11-17.

- NCTA's discussion seems aimed at the suitability of the POD / Host ("CableCARD / Host") interface itself, rather than at its testing. There is no basis in the record to question the security of the interface or to tie its security to the identity of the test lab used. Any withdrawal of support for this interface, now or in the future, would be unconscionable for consumers and for competition.

- The suggestion that because the CableCARD / Host interface is used nationally it is somehow less secure provides only a flawed and partial picture. Replaceable security is *more* secure in protecting the local delivery of cable services to the home -- it allows for renewability of the decryption circuitry via replacement of the POD. Use of PODs offers additional local options to cable operators independent of the brand of television or STB used, so avoids the pitfalls of a single, widely used conditional access system.[55]

- The only element of the CableCARD / Host interface that is not locally and physically renewable, so as to provide conditional access protection superior to integrated security, is the interface to the host device, which is protected for copy protection purposes only.[56] Unlike conditional access protection from the headend, such copy protection was envisioned and requested as a "tripwire," whose violation via unauthorized decryption devices would trigger suits for circumvention, and for intellectual property infringement.[57] These objectives have been met successfully in the CableCARD / Host interface and are not critical to the cable industry's concerns over fair and uniform testing.

- In raising generalized security concerns NCTA does not cite any valid reason to limit or diminish the role of independent laboratories. No reason is advanced why independent laboratories should be less skillful or committed to testing than is CableLabs. Any concerns over impartiality of test laboratories should apply to all laboratories; the FCC has made adequate provision for such concerns. If corporate relationships are an issue for other labs they are an issue for CableLabs as well, which is owned by MSOs that now control the navigation device market exclusively, and may -- indeed ought to -- view devices CableLabs tests as providing competition for their own devices.

---

[55] The supplier of the previous-generation national DBS system whose non-renewable security was successfully attacked was in fact the main security supplier to the cable industry. The attack proved successful because the reception devices had integrated security that could not, like a CableCARD, be physically renewed. *See* Charles Platt, *Satellite Pirates*, Wired 2.08, Aug. 1994, *available at* http://www.wired.com/wired/archive/2.08/satellite.html. The CableCARD / Host system is functionally different from the present-generation DBS "smartcard" systems, as well. These systems do not make the descrambler chip physically removable or renewable.

[56] At the time the interface was designed in its first version, such protection was not a cable industry agenda item – it was added to the final version at the request of motion picture industry engineers, with the support and assistance of consumer electronics and cable engineers.

[57] *See* HRRC Comments at 7-8.

VIII. CONCLUSION – ALL OF THE PETITIONED-FOR CHANGES SHOULD BE REJECTED, EXCEPT FOR THE CLARIFICATIONS JOINTLY RECOMMENDED BY CEA AND NCTA AND CERTAIN OTHERS SOUGHT BY NCTA.

With exceptions as noted above, the common theme in all of the petitions for reconsideration has been distortion and, indeed, reversal, of the competitive scheme directed by the Congress and implemented by the Commission in its June 1998, September 2000, and October 2003 Orders and Ruling. Several parties seek to turn the Encoding Rule regulations on their head, to read as implied mandates on consumer products rather than as explicit protections of them. Genesis would impose the processes of standards organizations, which are meant to eliminate barriers to innovation and interoperability, as obstacles instead, by requiring that progress be frozen over months or years until these processes have run their course. The Commission does have much work ahead of it in order to bring Congress's direction to full fruition, but this work must not include taking this proceeding in the directions proposed by these petitioners. The Consumer Electronics Parties do recommend FCC adoption of the proposal for the clarification to regulations jointly recommended with NCTA, which is set forth as an Exhibit to this Opposition.

Respectfully submitted,

Michael D. Petricone

Michael D. Petricone
Vice President, Technology Policy
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201
(703) 907-7600

Marc A. Pearl

Marc A. Pearl
Executive Director
Consumer Electronics Retailers Coalition
1341 G Street, N.W. – Suite 1100
Washington, D.C. 20005
(202) 585-0268

Of counsel:

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8081
Dated: March 10, 2004
WDC99 889321-3.045482.0012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on the following individuals on March 10, 2004, by first-class mail, postage prepaid:

Gary M. Epstein
James H. Barker
Latham & Watkins
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-2505

Jon A. Baumgarten
Bruce E. Boyden
Proskauer Rose LLP
1233 Twentieth Street, NW, Ste. 800
Washington, D.C. 20036

I. Fred Koenigsberg
White & Case, LLP
1155 Avenue of the Americas
New York, NY 10036

Paul Glist
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., NW, Ste. 200
Washington, D.C. 20006

Lewis M. Bachman
Executive Director
The Songwriters Guild of America
1500 Harbor Blvd.
Weehawken, NJ 07086

Terry G. Mahn
Robert J. Ungar
Robert Giles
Fish & Richardson, P.C.
Suite 1100
Washington, D.C. 20005

Marvin L. Berenson
General Counsel
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

William A. Check, Ph.D.
Vice President, Science & Technology
Andy Scott
Senior Director, Engineering
Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
National Cable & Telecommunications Association
1724 Massachusetts Ave., NW
Washington, D.C. 20036-1903

Edward P. Murphy
President & CEO
National Music Publishers' Association
475 Park Avenue South, 29th Fl.
New York, NY 10016

Janet Davis

Janet Davis